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CITATIONS

483275—42

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 330

GOLDBLATT BROS., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. It made findings of fact and conclusions of law. (R. 188–191.) The opinion of the Circuit Court of Appeals for the Seventh Circuit and the dissenting opinion (R. 208–215) are reported in 128 F. (2d) 576.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 23, 1942. (R. 216.) A petition for rehearing was denied June 16, 1942. (R. 217.)

Petition for certiorari was filed August 22, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. In a proceeding under the Illinois Bulk Sales Act against the bulk sales vendee to collect unpaid income and social security taxes of the vendor, did the trial court err in admitting in evidence the tax returns prepared and filed by the vendor?

2. Where the bulk sale took place in November, 1937, was the United States a creditor of the vendor with respect to 1937 income and social security taxes which had not then been assessed?

STATUTE INVOLVED

Illinois Bulk Sales Act (approved May 3, 1913, p. 258), Illinois Revised Statutes (1935), c. 121a:

> PAR. 1. *Sale, transfer or assignment in bulk of major part or whole of goods and chattels of vendor's business—When fraudulent and void as to creditors—Statement of vendor's liabilities—Notice by vendee to vendor's creditors—Payment of excess over indebtedness.*—Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That the sale, transfer, or assignment in bulk of the major part or the whole of a stock of merchandise, or merchandise and fixtures or other goods and chattels of the vendor's business, otherwise than in the ordinary

course of trade and in the regular and usual prosecution of the vendor's business shall be fraudulent and void as against the creditors of the said vendor, unless the said vendee shall, in good faith, at least five (5) days before the consummation of such sale, transfer or assignment demand and receive from the vendor a written statement under oath of the vendor or a duly authorized agent of the vendor having knowledge of the facts, containing a full, accurate and complete list of the creditors of the vendor, their addresses and the amounts owing to each as near as may be ascertained, and if there be no creditors, a written statement under oath to that effect; and unless the said vendee shall at least five days before taking possession of said goods and chattels and at least five days before the payment or delivery of the purchase price, or consideration of any evidence of indebtedness therefor, in good faith, deliver or cause to be delivered or send or cause to be sent personally or by registered letter properly stamped, directed and addressed, a notice in writing to each of the creditors of the vendor named in the said statement or of whom the said vendee shall have knowledge, of the proposed purchase by him of the said goods and chattels and of the price, terms and conditions of such sale: *Provided, however,* that it shall be lawful for the vendee to pay to the vendor so much of the purchase price as shall be in excess of the total amount of the indebtedness of the

vendor, before the expiration of the five days hereinabove referred to.

* * * * *

PAR. 3 (1). *Creditor may prosecute action at law or in equity—Judgment not prerequisite.* Sec. 4. Any creditor or creditors of the vendor of any stock of merchandise, merchandise and fixtures, or other goods and chattels of the vendor's business made in violation of the provisions of this Act, may pursue his remedy either at law or in equity, against either the vendor or vendors, the purchaser or purchasers, jointly or severally, or against the whole or any part of such stock of merchandise, merchandise and fixtures, or other goods and chattels, by a suit either at law or in equity, without having reduced his claim to judgment; and the court in which said suit is pending shall have jurisdiction to adjust the rights and equities of all parties having an interest in the property in such proceedings.

STATEMENT

The United States brought this action against petitioner pursuant to the Illinois Bulk Sales Act to recover income and Social Security taxes for the years 1936 and 1937. As found by the district court, a jury having been waived (R. 45), the essential facts are the following:

On November 17, 1937, petitioner, an Illinois corporation, purchased from the New Dahl Corporation, an Illinois corporation (hereinafter

called New Dahl), the bulk of the assets of the latter; the purchase and sale was not in the regular course of business of New Dahl. (R. 188.)

New Dahl, through its president, Norman Dahlman, executed and delivered to petitioner a list of creditors of New Dahl as of the date of the sale. The list did not contain the name of the United States or any of its agents. (R. 188.)

After the sale, New Dahl ceased to engage in any business activities, and petitioner, through its agents, Henry Applebaum and Samuel Tronsky, knew at the time of the sale that New Dahl would so cease upon the consummation of the sale. (R. 189.)

On the date of the sale, New Dahl was indebted to the United States of America on account of the following tax liabilities (R. 189):

Year	
1936 Income Tax	$717.58
1936 Social Security Taxes—Title IX	373.07
Nov.	
1937 Social Security Taxes—Title VIII	78.74
1937 Income Taxes	1,311.79
1937 Social Security Taxes—Title IX	1,733.58

On December 31, 1937, petitioner paid $39.44 to the Collector of Internal Revenue for the First Collection District of Illinois on account of the liability of the New Dahl Corporation for social security taxes under Title VIII of that Act for the month of November 1937, leaving a balance due on that item of tax liability in the amount of $39.30. (R. 189.)

Notice of the sale was sent by petitioner to the creditors of New Dahl named in the list of creditors, but no such notice was ever sent to the United States or to any of its agents. (R. 189.)

On the date of the sale, Henry Applebaum was one of the vice presidents and Samuel Tronsky was assistant secretary and comptroller of petitioner, and both were its officers and agents at the time of the sale, and at all times during which negotiations were had between it and New Dahl, which negotiations led to the consummation of the sale. (R. 189.) Henry Applebaum and Samuel Tronsky both had knowledge, individually and as officers and agents of petitioner, of the existence of the United States as a creditor of New Dahl for the tax liabilities aforesaid at the time the sale was consummated and during the time negotiations leading up to the consummation of the sale were had between petitioner and New Dahl. (R. 189–190.) Henry Applebaum was a duly authorized agent of Goldblatt Bros., Inc., to negotiate and effect the consummation of the sale. (R. 190.)

Upon these findings the District Court concluded (R. 190–191) that the tax liabilities of New Dahl were duly assessed; that the United States was, to that extent, a creditor at the time of the bulk sale; that petitioner had knowledge of such creditor relationship at and prior to the sale; and that by reason of the purchaser's failure to notify the United States of the sale the purchaser was liable under the Illinois Bulk Sales Act to the United

States for the seller's unpaid taxes. Judgment was entered for $4,983.14, with interest. (R. 192.) The Circuit Court of Appeals affirmed. (R. 216.)

ARGUMENT

1. The first ground asserted by the petitioner (Pet. 7) for the issuance of the writ relates to the admission in evidence of the 1937 tax returns prepared and filed by the bulk sales vendor. In the first place, it should be pointed out that the trial court did not rely on the returns. It reached the conclusion that the basic liability was established by the assessments. (R. 190.) It was stipulated (R. 50) that all of the basic tax liabilities of the vendor were duly and timely assessed by the Commissioner of Internal Revenue, and the trial court concluded that the United States was a creditor to the extent of such assessments. (R. 190.) Assessments alone are ordinarily sufficient to establish a *prima facie* case as to the basic tax liabilities. See *United States* v. *Rindskopf,* 105 U. S. 418; *Tameling* v. *Commissioner,* 43 F. (2d) 814 (C. C. A. 2d). It is noteworthy that Congress has provided, with respect to transferee proceedings before the Board of Tax Appeals, that the burden on the issue of the taxpayer's liability for the tax, as distinguished from the petitioner's liability as a transferee, is on the petitioner. Revenue Act of 1928, c. 852, 45 Stat. 791, sec. 602, I. R. C., sec. 1119(a). In the instant case, the evidentiary issue relates to the taxpayer's

liability; petitioner's obligation rests on the Illinois Bulk Sales Act. Clearly there is no federal policy which would weaken the evidentiary value of the Commissioner's determination here. No Illinois cases cited indicate a different local rule.

Even if it be assumed that the establishment of the liability depends upon the admission of the 1937 tax returns, petitioner's case is no stronger. The 1937 returns, though made after the bulk sale, constituted a declaration against interest and so had genuine probative value.[1] The cases cited by petitioner (Pet. 7) are plainly irrevelant. Both *Illman* v. *Kruse,* 301 Ill. 408, and *Delfosse* v. *Delfosse,* 287 Ill. 251, simply held that declarations were inadmissible to contradict the terms of a deed.

2. The petitioner further asserts (Pet. 9) that even if the basic tax liability of the vendor was sufficiently established, the United States was not a creditor for the 1937 income and social security taxes within the meaning of the Illinois Bulk Sales Act.

In the present posture of the case, petitioner accepts the decision so far as it concerns the 1936 tax liabilities. It follows that the United States was a creditor and entitled to notice under the Illinois Bulk Sales Act. If such notice had been given, there would have been an opportunity to

[1] By the terms of the sale the vendor retained the accounts receivable from its officers (R. 9; see R. 43), which would be available under the Illinois Bulk Sales Act, or otherwise, for the satisfaction of tax liabilities of the vendor.

make the jeopardy assessment referred to by petitioner (Pet. 11) with respect to the 1937 taxes. Thus, the question presented is the narrow one whether a creditor entitled to notice under the Act may pursue its remedies with respect to a claim that could have been fully liquidated by act of the creditor had the notice been given. Neither the terms of the Act nor the authorities cited by petitioner conflict with the decision below on this question.

The statute itself provides for the listing of "the amounts owing to each [creditor] as near as may be ascertained". The amount of the social security tax could have been exactly determined on the date of the sale since it was merely based upon a percentage of the vendor's payroll. In the case of the income tax, even apart from the possibility of a jeopardy assessment, the very nature of the bulk sale made it most unlikely that the vendor would transact any further business which might affect its income tax liability in the remaining period of less than two months, and hence a reasonable approximation of the liability could have been computed.

The cases cited by the petitioner (Pet. 10) are clearly distinguishable. *Knass* v. *Madison & Kedzie State Bank*, 269 Ill. App. 588, and *Tipsword* v. *Doss*, 273 Ill. App. 1, dealt with the applicability of the statute to the transfer of bank assets and the sale of farming equipment, respectively. *Coon* v. *Doss*, 361 Ill. 515, held that the statute does not cover the assignee of a note acquired almost four years after the bulk sale. *Smead Co., Inc.* v. *J.*

Oliver Johnson, Inc., 262 Ill. App. 385; *Stony Island Trust & Savings Bank* v. *Stony Island State Savings Bank*, 240 Ill. App. 195, and *Superior Plating Works* v. *Art Metal Crafts Co.*, 218 Ill. App. 148, stand for the rule that the statute is inapplicable to persons holding contingent claims for damages in tort, or damages for breach of contract which depend on the difference between contract and market price. *Lawndale Sash and Door Company* v. *West Side Trust & Savings Bank*, 207 Ill. App. 3, ruled that a lessor could not be considered a creditor at the time of a bulk sale if all rent due to date under the lease had been paid. At most the local decisions leave the application of the statute in doubt. There is no occasion to disturb the considered decision of the court below.

CONCLUSION

There is no error in the decision below, or a conflict of authorities. The petition should be denied.

Respectfully submitted,

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